

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

HAROLD MAPLE, individually and  
on behalf of all others similarly  
situated,

Plaintiff,

v.

COSTCO WHOLESALE CORP., et  
al.,

Defendants.

NO: 12-CV-5166

ORDER GRANTING IN PART AND  
DENYING IN PART MOTION TO  
DISMISS

**BEFORE THE COURT** is a Motion to Dismiss, filed by Defendant Costco Wholesale Corporation, ECF No. 52. Defendant Niagara Bottling, LLC joined Costco's motion, ECF No. 53. This matter was heard with telephonic oral argument on July 25, 2013. Paul E. Fogarty and Scott E. Schutzman appeared on behalf of Plaintiff Harold Maple. Kathleen M. O'Sullivan and Nicholas A. Manheim appeared for Defendant Costco Wholesale Corporation. John A. Safarli

1 appeared for Defendant Niagara Bottling. The Court has reviewed the briefing and  
2 the file, and is fully informed.

### 3 BACKGROUND

4 This is a putative class action arising from allegedly false and misleading  
5 claims made on the label of a product known as VitaRain Tropical Mango Vitamin  
6 Enhanced Water Beverage (“VitaRain”) bottled by Defendant Niagara Bottling,  
7 LLC (“Niagara”), and sold by Defendant Costco Wholesale Corporation  
8 (“Costco”). On behalf of a putative class consisting of all Washington residents  
9 who purchased the product over the four years preceding the filing of this lawsuit,  
10 Plaintiff asserts claims for (1) violations of the Washington Consumer Protection  
11 Act (“CPA”), RCW 19.86.010 *et seq.*; (2) misrepresentation; and (3) negligence.

12 Plaintiffs allege in their amended complaint, ECF No. 51, that Defendant  
13 Niagara manufactures and bottles a product known as VitaRain Vitamin Enhanced  
14 Water Beverage. VitaRain comes in four flavors: Tropical Mango, Raspberry  
15 Green Tea, Kiwi Strawberry, and Dragonfruit. The product is marketed and  
16 distributed by Defendant Costco and is sold at Costco warehouses throughout the  
17 country.

18 In November 2010, Plaintiff Harold Maple (“Plaintiff”) purchased several  
19 bottles of VitaRain from a Costco store located in Kennewick, Washington.  
20 Among the bottles that Plaintiff purchased was at least one bottle of VitaRain

1 Tropical Mango. Plaintiff alleges that the VitaRain Tropical Mango drink was  
2 marketed as a natural product but in fact contained “unnatural” ingredients,  
3 including large amounts of “synthetic caffeine.” Specifically, Plaintiff alleges that  
4 the VitaRain Tropical Mango drink (1) lacks a front-facing disclosure that the  
5 beverage contains caffeine; (2) fails to disclose the relative amount of caffeine in  
6 the beverage; and (3) falsely claims that the beverage is a “natural tonic” and  
7 contains “natural caffeine.” Pl.’s Am. Compl., ECF No. 51, at ¶¶ 15, 18. Plaintiff  
8 further alleges that he “reasonably believed that he [had] purchased a Drink similar  
9 to vitamin water.” ECF No. 51, at ¶ 14.

10 Plaintiff’s amended complaint contains no allegations that Plaintiff actually  
11 read the statements that the beverage is a “natural tonic” and contains “natural  
12 caffeine” prior to purchasing the product. However, the amended complaint does  
13 allege in a conclusory fashion that, but for these allegedly false and misleading  
14 statements, Plaintiff and others similarly situated would not have purchased the  
15 VitaRain Tropical Mango product. ECF No. 51, at ¶ 31, 41.

16 Defendant Costco moved to dismiss Plaintiff’s amended complaint. Costco  
17 contends (1) that Plaintiff does not have standing to assert his claims; (2) that some  
18 of Plaintiff’s claims are preempted by federal law; and (3) that Plaintiff’s amended  
19 complaint fails to meet the pleading standards of Rules 8 and 9(b) of the Federal  
20 Rules of Civil Procedure. ECF No. 52. Costco additionally moved the Court to

1 take judicial notice of the label on the VitaRain Tropical Mango drink and the  
2 exterior packaging of the VitaRain Vitamin Enhanced Water Beverage. ECF No.  
3 54. Defendant Niagara Bottling joined Costco's motion to dismiss the amended  
4 complaint. ECF No. 53.

### 5 DISCUSSION

6 Federal Rule of Civil Procedure 12(b)(6) allows for dismissal of a complaint  
7 where the plaintiff fails to state a claim upon which relief can be granted. A  
8 motion to dismiss brought pursuant to this Rule "tests the legal sufficiency of a  
9 [plaintiff's] claim." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To  
10 withstand dismissal, a complaint must contain "enough facts to state a claim to  
11 relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,  
12 570 (2007). "Naked assertion[s]," "labels and conclusions," or "formulaic  
13 recitation[s] of the elements of a cause of action will not do." *Id.* at 555, 557. "A  
14 claim has facial plausibility when the plaintiff pleads factual content that allows  
15 the court to draw the reasonable inference that the defendant is liable for the  
16 misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While a  
17 plaintiff is not required to establish a probability of success on the merits, he or she  
18 must demonstrate "more than a sheer possibility that a defendant has acted  
19 unlawfully." *Id.*

1 A complaint also must contain a “short and plain statement of the claim  
2 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). This  
3 standard “does not require detailed factual allegations, but it demands more than an  
4 unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at  
5 678 (quoting *Twombly*, 550 U.S. at 555). In assessing whether Rule 8(a)(2) has  
6 been satisfied, a court must first identify the elements of the plaintiff’s claim(s) and  
7 then determine whether those elements could be proven on the facts pled. The  
8 court generally should draw all reasonable inferences in the plaintiff’s favor, *see*  
9 *Sheppard v. David Evans and Assocs.*, 694 F.3d 1045, 1051 (9th Cir. 2012), but it  
10 need not accept “naked assertions devoid of further factual enhancement.” *Iqbal*,  
11 556 U.S. at 678 (internal quotations and citation omitted).

12 Rule 9(b) governs the pleading of allegations involving fraud or mistake. In  
13 contrast to the more lenient standard set forth in Rule 8(a)(2), Rule (9)(b) requires  
14 a plaintiff to “state with particularity the circumstances constituting fraud or  
15 mistake.” Fed. R. Civ. P. 9(b). To satisfy this standard, the allegations of fraud  
16 must “be specific enough to give defendants notice of the particular misconduct so  
17 that they can defend against the charge and not just deny that they have done  
18 anything wrong.” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.  
19 2003) (quotation and citation omitted). Thus, “[a]llegations of fraud must be  
20 accompanied by the who, what, when, where, and how of the misconduct

1 charged.” *Id.* (quotation and citation omitted). A plaintiff may, however, plead  
2 allegations of “[m]alice, intent, knowledge, and other conditions of a person’s  
3 mind” in a more general fashion. Fed. R. Civ. P. 9(b).

#### 4 **A. Judicial Notice of VitaRain Labeling**

5 Before addressing the merits of Costco’s motion to dismiss, the Court must  
6 consider Costco’s request that the Court take judicial notice of the packaging for  
7 the twenty-four pack VitaRain Enhanced Water Beverage sold in Costco stores and  
8 for the individual VitaRain Tropical Mango drink Plaintiff refers to in his amended  
9 complaint.

10 Ordinarily, when the district court considers matters outside the pleadings it  
11 must convert a motion to dismiss brought under Civil Rule 12(b)(6) into a Civil  
12 Rule 56 motion for summary judgment. Fed. R. Civ. P. 12(d). However, a court  
13 may consider certain materials without converting the motion to dismiss into a  
14 motion for summary judgment. *See, e.g., United States v. Ritchie*, 342 F.3d 903,  
15 908 (9th Cir. 2003). Such materials include documents attached to the complaint,  
16 documents incorporated by reference in the complaint, or matters of judicial notice.  
17 *Id.*

18 A document may be incorporated by reference into a complaint where the  
19 plaintiff “refers extensively to the document or the document forms the basis of  
20 plaintiff’s claim.” *Id.* (citations omitted). In such cases, the defendant may offer

1 that document and the district court may treat the document as part of the  
2 complaint for the purposes of a motion to dismiss. *Id.*; *see also Branch v. Tunnell*,  
3 14 F.3d 449, 453-54 (9th Cir. 1994), *overruled on other grounds by Galbraith v.*  
4 *Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (“[W]e hold that documents  
5 whose contents are alleged in a complaint and whose authenticity no party  
6 questions, but which are not physically attached to the pleading, may be considered  
7 in ruling on a Rule 12(b)(6) motion to dismiss.”).

8 Costco contends that the Court may consider the VitaRain packaging and the  
9 individual VitaRain Tropical Mango label either through incorporation by  
10 reference or judicial notice. Costco points out that Plaintiff refers extensively to  
11 the packaging and label in his amended complaint. For example, Plaintiff states  
12 that the front label of the Tropical Mango drink fails to disclose that the beverage  
13 contains caffeine, that “the entire label omits the relative amount of caffeine the  
14 Drink contains by failing to provide a daily value amount,” and that the drink’s  
15 label states that the drink is a “natural tonic.” ECF No. 51, at 2-3. The packaging  
16 and label in fact forms the very basis of Plaintiff’s claims. *See, e.g., Pl.’s Am.*  
17 *Compl.*, ECF No. 51, at 16 (stating that Defendants “made false representations  
18 and/or misrepresentations by omission” by failing to disclose “the relative amount  
19 of caffeine in the Drink anywhere [on] the label”).  
20

1 Plaintiff did not oppose Costco's request for judicial notice at the briefing  
2 stage. In addition, Plaintiff himself relied upon the packaging and labeling images  
3 submitted by Costco in his opposition to Costco's motion to dismiss. ECF No. 55,  
4 at 2, 6. However, Plaintiff opposed consideration of the exterior packaging for the  
5 first time at oral argument. Plaintiff theorized that the packaging may not have  
6 been the same packaging in existence when Mr. Maple purchased the VitaRain  
7 product, but offered no support for this argument. Plaintiff further objected that  
8 some of the images of the packaging and labels submitted by Costco were difficult  
9 to read. The Court gave Costco an opportunity to submit clearer images of the  
10 exhibits. Costco submitted replacement images after oral argument, ECF No. 73,  
11 which the Court has considered in ruling on this motion.

12 Therefore the Court concludes that judicial notice is appropriate and that it  
13 may consider the labeling without converting Costco's motion to dismiss into one  
14 for summary judgment.

## 15 **B. Standing**

16 Costco contends that Plaintiff lacks standing to pursue his claims. A  
17 plaintiff seeking to invoke the jurisdiction of the federal courts must establish that  
18 he can satisfy the "case or controversy" requirement of Article III of the United  
19 States Constitution. This standing requirement can be broken down to three  
20 individual elements: an injury in fact, a "causal connection between the injury and



1 the conduct complained of,” and the likelihood that the injury will be redressed by  
2 a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).  
3 Each element of standing “must be supported . . . with the manner and degree of  
4 evidence required at the successive stages of the litigation.” *Id.* at 561.

5 Costco contends that Plaintiff cannot show a causal connection between the  
6 allegedly false and misleading labeling and his act of purchasing the product.

7 Costco first contends that the Complaint contains an interceding cause unrelated to  
8 the labeling, because Plaintiff states in his amended complaint that “he reasonably  
9 believed that he purchased a Drink similar to vitamin water.” ECF No. 51, at ¶ 14.

10 Costco additionally directs the Court to the packaging and labeling of the product  
11 and contends that the statements and omissions Plaintiff complains of were not  
12 visible at the time that Plaintiff purchased the product and could not have caused  
13 his alleged injuries. In support of this assertion, Defendants note that VitaRain is  
14 sold by Costco exclusively in 24-unit “variety packs” which are encased in printed  
15 plastic packaging. According to Defendants, the labels on individual bottles of  
16 VitaRain Tropical Mango are not visible through this exterior packaging. As a  
17 result, they argue, “Plaintiff obviously has no standing to complain about  
18 something he could not and did not see prior to purchase.” ECF No. 52 at 7.

19 However, as Plaintiff correctly notes, at least one of the allegedly false and  
20 misleading statements pertaining to VitaRain Tropical Mango, the claim that

1 VitaRain contains “natural caffeine,” is reproduced on the exterior of packaging of  
2 the variety pack. *See* ECF No. 54, Exhibits 2, 3. The variety pack’s exterior  
3 packaging also contains a full-length photograph of a bottle of VitaRain Tropical  
4 Mango. *See* ECF No. 54, Exhibits 2, 3, 5. This photograph is an accurate  
5 reproduction of the front-facing label of the beverage, which, as alleged in the  
6 Amended Complaint, does not state that the beverage contains caffeine. *Compare*  
7 ECF No. 54, Exhibit 3 *with* ECF No. 54, Exhibit 8. In addition, the exterior  
8 packaging is clear in many portions such that a consumer could see at least some of  
9 the label on the individual bottles, including the Tropical Mango variety, prior to  
10 purchasing the item. ECF No. 54, Exhibits 1, 5.

11 Moreover, contrary to Defendants’ assertions, Plaintiff has alleged a  
12 sufficient causal connection between the product labeling and his decision to  
13 purchase the product to establish Article III standing. The Amended Complaint  
14 generally alleges that Plaintiff and other class members would not have purchased  
15 the product had they known that it contained (1) a significant amount of caffeine;  
16 and (2) synthetic caffeine and other “non-natural” ingredients. Pl.’s Am. Compl.,  
17 ECF No. 51, at ¶¶ 31, 41.

18 A motion to dismiss for lack of standing is brought pursuant to Civil Rule  
19 12(b)(1). *E.g.*, *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). Thus  
20 the standards of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v.*

1 *Twombly*, 550 U.S. 544 (2007) do not apply when evaluating a complaint for lack  
2 of standing, because those standards are applicable only to a Rule 12(b)(6) motion  
3 for failure to state a claim. *Maya*, 658 F.3d at 1067-68. With this in mind, the  
4 Court concludes that Plaintiff's allegations in his amended complaint that he would  
5 not have purchased the product but for the alleged misrepresentations is sufficient  
6 to satisfy the standing requirement at the pleading stage.

### 7 **C. Preemption**

8 Dismissal under Civil Rule 12(b)(6) "can be based on the lack of a  
9 cognizable legal theory or the absence of sufficient facts alleged under a  
10 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
11 (9th Cir. 1988). Where a state law claim is preempted by federal law, that claim  
12 must be dismissed under Civil Rule 12(b)(6) because the claimant cannot establish  
13 any set of facts that will support the claim for relief. *Kent v. DaimlerChrysler*  
14 *Corp.*, 200 F. Supp. 2d 1208, 1212 (N.D. Cal. 2002).

15 Federal preemption of state law occurs when "(1) Congress enacts a statute  
16 that explicitly pre-empts state law; (2) state law actually conflicts with federal law;  
17 or (3) federal law occupies a legislative field to such an extent that it is reasonable  
18 to conclude that Congress left no room for state regulation in that field." *Chae v.*  
19 *SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010). Federal pre-emption will not be  
20 found except where it is "the clear and manifest purpose of Congress." *Law v.*

1 *Gen. Motors Corp.*, 114 F.3d 908, 910 (9th Cir. 1997) (quoting *CSX Transp., Inc.*  
2 *v. Easterwood*, 507 U.S. 658, 664 (1993)).

3 Defendants argue that Plaintiff's claims are expressly preempted by the  
4 Federal Food Drug and Cosmetics Act ("FDCA"), as amended by the National  
5 Labeling and Education Act ("NLEA"), 21 U.S.C. § 301 *et seq.* The FDCA  
6 "comprehensively regulates food and beverage labeling." *Pom Wonderful LLC v.*  
7 *Coca-Cola Co.*, 679 F.3d 1170, 1175 (9th Cir. 2012). The NLEA was in turn  
8 enacted to "clarify and strengthen the Food and Drug Administration's legal  
9 authority to require nutrition labeling on foods, and to establish the circumstances  
10 under which claims may be made about the nutrients in foods." *Nutritional Health*  
11 *Alliance v. Shalala*, 144 F.3d 220, 223 (2d Cir. 1998) (citing H.R. Rep. No. 101–  
12 538, at 7 (1990)). Most notably, the NLEA added an express preemption provision  
13 to the FDCA. *See* 21 U.S.C. 21 U.S.C. § 343-1(a).

14 In Defendants' view, the Amended Complaint "seeks to create and impose"  
15 two new requirements which would directly conflict with federal law: (1) a  
16 requirement that caffeinated beverages disclose the fact that they contain caffeine  
17 on the front label; and (2) a requirement that labels state the "relative amount" of  
18 caffeine by providing a "daily value" amount. ECF No. 56 at 3. By virtue of  
19 imposing these new and conflicting requirements, Defendants contend, Plaintiff's  
20 claims are preempted under 21 U.S.C. § 343-1(a).

1 Plaintiff focuses his argument on his claims that Defendants' use of the word  
2 "natural" on the labeling is not preempted by the NLEA. However, Costco did not  
3 contend that these particular claims were preempted. Rather, Costco focused only  
4 on Plaintiff's claims that the label was unlawful because it failed to disclose on the  
5 front label that the drink contains caffeine and failed to disclose the relative  
6 amount of caffeine in the drink. ECF No. 56, at 2. Costco has shown that these  
7 food labeling requirements are expressly covered by 21 C.F.R. § 101.1-101.4 and  
8 21 C.F.R. § 101.9(c), respectively. Federal law preempts any state law that would  
9 impose additional requirements on how food labels present nutrition information.  
10 21 U.S.C. § 343-1(a); *Turek v. Gen. Mills, Inc.*, 662 F.3d 423, 426 (7th Cir. 2011).

11 The Court holds that federal law preempts Plaintiff's claims that (1)  
12 Defendants were required to disclose that the drink contained caffeine on the front  
13 label of the drink and (2) that Defendants were required to state the "relative  
14 amount" of caffeine in the drink. Therefore Costco's motion to dismiss is granted  
15 as to these claims.

#### 16 **D. Pleading Requirements**

17 Defendants also argue that Plaintiff has not pled his claims with sufficient  
18 particularity. With regard to Plaintiff's CPA claims, Defendants assert that the  
19 Amended Complaint fails to plead a causal connection between the allegedly false  
20 and misleading labeling and Plaintiff's decision to purchase the product. As to the

1 misrepresentation claims, Defendants argue, among other asserted defects, that  
2 Plaintiff has failed to adequately allege reliance. Finally, with respect to the  
3 negligence claim, Defendants argue that Plaintiff has failed to adequately plead the  
4 existence of a duty of care. The Court will address the legal sufficiency of each of  
5 these claims in turn.

6 1. CPA Claims

7 To state a claim for a violation of the CPA, a plaintiff must allege: (1) an  
8 unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) which  
9 impacts the public interest; and (4) an injury to business or property; (5) which was  
10 caused by the deceptive act or practice. *Columbia Physical Therapy, Inc., P.S. v.*  
11 *Benton Franklin Orthopedic Assocs., PLLC*, 168 Wn. 2d 421, 442 (2010). Here,  
12 Defendants contend that Plaintiff has failed to adequately plead causation.  
13 Specifically, Defendants contend that Plaintiff has not alleged that he even read the  
14 complained-of labels before purchasing the VitaRain drink. Defendants  
15 additionally contend that Plaintiff affirmatively alleged that something other than  
16 the labels led him to purchase the VitaRain drink, namely Plaintiff's stated belief  
17 that he had "purchased a Drink similar to vitamin water." ECF No. 51, at ¶ 14.

18 Plaintiff's amended complaint contains detailed allegations about what was,  
19 and what was not, on the label of the VitaRain Tropical Mango drink he purchased,  
20 but nowhere does Plaintiff state that he actually read the label, or that his

1 purchasing decision was driven by the alleged deceptive statements on the label.  
2 Plaintiff's amended complaint contains only broad conclusory statements on  
3 causation. For example, with regard to Plaintiff's Consumer Protection Act claim,  
4 Plaintiff alleges that the "Plaintiff and class members have suffered as a result of  
5 Defendants' unlawful conduct because they purchased an energy Drink they would  
6 otherwise not have purchased had the correct disclosures been made." ECF No.  
7 ECF No. 51, at ¶ 31. This allegation makes little sense in light of Plaintiff's failure  
8 to allege that he even read the allegedly deceptive labels prior to purchasing the  
9 drink.

10 A complaint cannot survive a Rule 12(b)(6) motion to dismiss unless it  
11 contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is  
12 plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).  
13 The complaint must contain more than "an unadorned, the-defendant-unlawfully-  
14 harmed-me accusation." *Id.* Neither a "formulaic recitation of the elements of a  
15 cause of action" nor "naked assertion[s] devoid of further factual enhancement"  
16 will suffice. *Id.* (internal quotations omitted). Moreover, the traditional tenet that  
17 the court must accept as true all allegations contained in the complaint is not  
18 applicable to legal conclusions. *Id.*

19 In light of Plaintiff's failure to allege that he relied on the alleged deceptive  
20 statements on the label, or that he even read such statements prior to purchasing the

1 drink, the Court cannot credit the naked assertions that he would not have  
2 purchased the drink had the label not contained such statements. Plaintiff's CPA  
3 claim is therefore dismissed under Civil Rule 12(b)(6) for failing to adequately  
4 plead causation.

5 2. Misrepresentation Claim

6 Washington recognizes two separate torts involving misrepresentation:  
7 fraudulent misrepresentation and negligent misrepresentation. *See Stiley v. Block*,  
8 130 Wn. 2d 486, 505 (1996) (fraudulent misrepresentation); *Haberman v. Wash.*  
9 *Pub. Power Supply Sys.*, 109 Wn. 2d 107, 161-62 (1987) (negligent  
10 misrepresentation). To prevail on a claim for fraudulent misrepresentation, a  
11 plaintiff must prove the following nine elements by clear and convincing evidence:  
12 "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's  
13 knowledge of its falsity; (5) intent of the speaker that it should be acted upon by  
14 the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the  
15 truth of the representation; (8) plaintiff's right to rely upon the representation; and  
16 (9) damages suffered by the plaintiff." *West Coast, Inc. v. Snohomish Cnty.*, 112  
17 Wn. App. 200, 206 (2002) (citing *Stiley*, 130 Wn. 2d at 505). In the absence of  
18 contrived concealment or an affirmative duty to disclose, omissions cannot give  
19 rise to a claim for fraudulent misrepresentation. *See* 16 David K. DeWolf & Keller  
20 W. Allen, *Washington Practice: Tort Law and Practice* § 18.7 (3d ed.) ("While



1 silence itself is not actionable, silence becomes actionable when either the  
2 defendant uses a trick or artifice to prevent an adversary from discovering the  
3 truth, or where the defendant has a duty to speak and fails to do so.” (internal  
4 citations omitted).

5 To prevail on a negligent misrepresentation claim, a plaintiff “must prove by  
6 clear, cogent and convincing evidence that (1) the defendant supplied information  
7 for the guidance of others in their business transactions that was false, (2) the  
8 defendant knew or should have known that the information was supplied to guide  
9 the plaintiff in his business transactions, (3) the defendant was negligent in  
10 obtaining or communicating the false information, (4) the plaintiff relied on the  
11 false information, (5) the plaintiff’s reliance was reasonable, and (6) the false  
12 information proximately caused the plaintiff damages.” *Ross v. Kirner*, 162 Wn.  
13 2d 493, 499 (2007) (citation omitted). Moreover, “[a]n omission alone cannot  
14 constitute negligent misrepresentation, since the plaintiff must justifiably rely on a  
15 misrepresentation.” *Id.* (citations omitted).

16 Defendants have raised three challenges to Plaintiff’s misrepresentation  
17 claims. First, Defendants contend that Plaintiff “cannot state a claim for  
18 misrepresentation arising from the *omission* of the drink’s caffeine content from  
19 the VitaRain Tropical Mango label.” ECF No. 52 at 15 (emphasis in original).  
20 The Court agrees. As noted above, omissions cannot give rise to a claim for

1 fraudulent or negligent misrepresentation absent special circumstances not alleged  
2 here.

3 Second, Defendants argue that the misrepresentation claims arising from the  
4 “natural caffeine” and “natural tonic” statements fail to satisfy Rule 9(b)’s  
5 heightened pleading requirements. On this point, the Court disagrees. Contrary to  
6 Defendants’ assertions, the allegations in the Amended Complaint are “specific  
7 enough to give defendants notice of the [alleged] misconduct so that they can  
8 defend against the charge and not just deny that they have done anything wrong.”  
9 *Vess*, 317 F.3d at 1106 (quotation and citation omitted). Plaintiff has specifically  
10 alleged that VitaRain Tropical Mango (1) “is manufactured using gelatin capsules  
11 that contain caffeine in powdered form . . . [that] is synthetic and not natural,” and  
12 (2) “contains unnatural ingredients and ingredients derived from synthetic and/or  
13 non-natural processes, including, but not limited to, synthetic caffeine, sucralose  
14 and acesulfame potassium.” ECF No. 51, at ¶ 15, 18. These allegations are  
15 sufficiently detailed to facilitate a proper defense by Defendants.

16 Finally, Defendants suggest that Plaintiff cannot prove the reliance elements  
17 of his fraudulent misrepresentation and negligent misrepresentation claims because  
18 he has not alleged that he saw the alleged misrepresentations prior to purchasing  
19 the drink. The Court holds that Plaintiff’s misrepresentation claim must be  
20 dismissed for the same reason that his CPA claim is dismissed: Plaintiff has failed

1 to adequately plead reliance because he has not alleged that he based his  
2 purchasing decision on the complained-of labels or that he even read the labels  
3 prior to purchasing the drink.

4 Defendants additionally suggest that Plaintiff has not provided sufficient  
5 allegations to satisfy additional elements of a fraudulent or negligent  
6 misrepresentation claim, namely that the alleged misrepresentations were material,  
7 that Defendants intended for Plaintiff to act on the alleged falsehoods, that  
8 Defendants knew the representations were false, that Plaintiff was ignorant of the  
9 falsity, that Plaintiff had a right to rely on the falsehood, or that the reliance was  
10 reasonable. The Court need not reach Defendants' argument as to these elements  
11 because the lack of adequately alleged reliance is fatal to Plaintiff's claim.

### 12 3. Negligence Claim

13 There are four elements to a common law negligence claim in Washington:  
14 duty, breach, causation and damages. *Michaels v. CH2M Hill, Inc.*, 171 Wn. 2d  
15 587, 605 (2011). As to the first element, the existence of a duty of care is a  
16 "threshold question" in any negligence action. *Schooley v. Pinch's Deli Mkt., Inc.*,  
17 134 Wn. 2d 468, 474 (1998) (citing *Kelly v. Falin*, 127 Wn. 2d 31, 36 (1995)). A  
18 duty of care is defined as "an obligation, to which the law will give recognition and  
19 effect, to conform to a particular standard of conduct toward another." *Affiliated*  
20 *FM Ins. Co. v. LTK Consulting Servs., Inc.*, 170 Wn. 2d 442, 449 (2010) (internal

1 quotation and citation omitted). Whether a duty of care exists is a matter of law to  
2 be decided by the court rather than by a jury. *Osborn v. Mason Cnty.*, 157 Wn. 2d  
3 18, 23 (2006). In examining a duty of care, Washington courts consider the duty's  
4 existence, measure, and scope. *Affiliated FM Ins. Co.*, 170 Wn. 2d at 449. In  
5 deciding whether the law imposes a duty of care, a court must balance  
6 "considerations of logic, common sense, justice, policy, and precedent." *Id.* at 450  
7 (internal quotations and citations omitted).

8 Defendants contend that Plaintiff fails to adequately plead the existence of a  
9 duty of care. The Court agrees. Plaintiff's Amended Complaint contains only one  
10 allegation relevant to this element of a negligence claim: "The Defendants owed a  
11 duty to the Plaintiff and class members to act reasonably and with appropriate care  
12 when dealing with Plaintiff and class members." ECF No. 51, at ¶ 47. Plaintiff's  
13 response to the instant motion is similarly conclusory: "Plaintiff asserts that  
14 Defendant owed a duty under the common law as well to properly label its  
15 beverages. As such the motion to dismiss should be denied." ECF No. 55 at 10.

16 These statements are nothing more than "unadorned, the defendant-  
17 unlawfully-harmed-me accusation[s]" that the Court need not accept as true. *Iqbal*,  
18 556 U.S. at 678. Therefore, the Court finds that Plaintiff has not adequately  
19 alleged that any duty was owed, and therefore dismissal of Plaintiff's negligence  
20 claim is appropriate.

1       **E. Opportunity to Amend**

2       Plaintiff requested an opportunity to amend his complaint in the event that  
3 the Court found it deficient and granted Defendants' motion for dismissal. ECF  
4 No. 55, at 10-11. Defendants contend that any amendment would be futile.

5       Federal Rule of Civil Procedure 15(a)(2) provides that the district court  
6 "should freely give leave [to amend] when justice so requires." *See also Balistreri*  
7 *v. Pacifica Police Dep't*, 901 F.2d 696, 701 (9th Cir. 1990) ("The standard for  
8 granting leave to amend is generous."). The court should consider five factors in  
9 determining whether to grant leave to amend: "bad faith, undue delay, prejudice to  
10 the opposing party, futility of amendment, and whether the plaintiff has previously  
11 amended the complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995  
12 (9th Cir. 2011). Futility exists where it is "clear" that no amendment could save  
13 the complaint. *Id.*

14       Plaintiff is entitled to an opportunity to amend his complaint. The Court  
15 notes that Plaintiff previously has amended his complaint, but such amendment  
16 was unopposed and was not made in response to an order dismissing Plaintiff's  
17 claims. Moreover, the Court cannot find that any amendment would be futile.

18       Accordingly, **IT IS HEREBY ORDERED** that Defendant Costco's Motion  
19 to Dismiss Plaintiff's Amended Complaint, **ECF No. 52**, is **GRANTED IN PART**  
20 and **DENIED IN PART**. Plaintiff's claims regarding the disclosure of caffeine on

1 the front label of the drink and the “relative amount” of caffeine in the drink are  
2 preempted by federal law. Plaintiff’s claims are additionally dismissed for failure  
3 to state a claim under Civil Rule 12(b)(6). However, Costco’s motion to dismiss is  
4 denied as to the issue of standing. **Plaintiff shall have fourteen days from the**  
5 **date of this Order to amend his complaint.**

6 The District Court Clerk is hereby directed to enter this Order and to provide  
7 copies to counsel.

8 **DATED** this 1st day of August 2013.

9  
10 *s/ Rosanna Malouf Peterson*  
11 ROSANNA MALOUF PETERSON  
12 Chief United States District Court Judge  
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